IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7725 of 1999
with
CIVIL APPLICATION No 3669 of 2001
&
CIVIL APPLICATION No 3702 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT AMBUJA CEMENT LTD.

Versus

SARDAR SAROVAR NARMADA NIGAM LIMITED

Appearance:

1. Special Civil Application No. 7725 of 1999 with
Civil Applications No.3669/2001 & 3702/2003
MR HARIN P RAVAL for Petitioner No. 1
MR KH KAJI for Respondent No. 1-2
MR GC MAZMUDAR for Respondent No. 1
GOVERNMENT PLEADER for Respondent No. 3/1-3/2

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 29/01/2004

ORAL JUDGEMENT

By filing this petition, the petitioner-company has prayed that the order passed by the respondent-Corporation dated 30-9-1999 be quashed and set aside and that the respondents may be restrained from taking further action on the basis of the aforesaid order at Annexure-T to the petition.

2) The petitioner-company had undertaken a contract in the matter of providing cement to the respondent-Corporation. It is not in dispute that the said contract came to an end as the petitioner - company has already supplied the cement, which was agreed as per the contract. The petitioner-company was also paid the amount from time to time as stipulated in the contract. It is pointed out to this Court that seven contracts were executed by the respondent-corporation in the matter of purchase of cement from the petitioner-company. Particulars of such tenders are also given in the impugned order, which is at Annexure-T, at page 198 of the compilation. In one of the clauses, which is at page 200 in the compilation, it is provided as under :

"Taxes, duties and licences levied by authorities in India on the finished goods prevailing on the day of filing of tender shall be included in the bid price."

3) There are certain other clauses also in the agreement, which are incorporated in the said order which is at Annexure-T. By the impugned order, the Superintending Engineer of the respondent-Corporation came to the conclusion that the petitioner-company is liable to refund the amount of Rs.12,13,52,078.88 ps. as the aforesaid amount was paid in excess of the amount, which was required to be paid to the petitioner-company by the respondent-Corporation. According to the respondent-Corporation, the aforesaid amount is the amount of Sales Tax, which is paid by the respondent-Corporation to the petitioner-company but according to the respondent-Corporation, the petitioner-company was exempted from payment of sales tax upto a particular year and, therefore, since the amount has not been paid to the Sales Tax Department, the said amount is required to be paid back by the petitioner-company to the respondent-Corporation. Ultimately, by the impugned order, the Superintending Engineer took a decision, asking the petitioner-company to refund the aforesaid amount to the

respondent-Corporation.

4) Being aggrieved by the aforesaid order, the petitioner has filed this writ petition on various grounds. The contention of the petitioner-company is that the aforesaid disputed amount is included in the total price as per the contract, which is inclusive of taxes and, therefore, it is not required to be bifurcated towards component of sales tax. It is, therefore, argued by the petitioner that it is not open for the Superintending Engineer to take such decision, which, otherwise, according to the petitioner, is a unilateral decision and on the basis of the same, it is not open for the Corporation to retain the remaining amount, which is required to be paid to the petitioner-company. The petition is resisted by the respondent-Corporation on various grounds, such as maintainability of the petition, disputed questions of fact as well as the same is also resisted on merits.

5) During the pendency of this petition, the respondent-Corporation has also filed nine Special Civil Suits for the purpose of recovering certain amount, which according to them, they have overpaid to the petitioner-company. The particulars of the said suits are as under :

Special Civil Suit No.	Total amount (Suit amount + interest)
773/2002	5,89,70,011/-
774/2002	18,28,42,551/-
775/2002	3,63,18,556/-
776/2002	14,66,39,746/-
777/2002	21,81,85,172/-
778/2002	63,86,137/-
779/2002	5,61,62,013/-
884/2002	11,69,43,302/-
885/2002	48,35,241/-

6) Above suits are pending before the Civil Judge (S.D.) at Baroda. The main grievance which is required to be decided in this petition is whether the petitioner-company is liable to refund the aforesaid amount of Rs.12,13,52,078.88 ps., as per the order of the Superintending Engineer and whether the respondent-Corporation is entitled to get back the aforesaid amount, which is paid to the petitioner-company, on the ground that the

petitioner-company was not required to pay sales tax and, therefore, the said amount is required to be refunded to the respondent-Corporation. It is not in dispute that this very amount is already included in the suits, which are pending in the court of Civil Judge (S.D.), Baroda. Over and above the aforesaid amount, which is in question in this petition, suits are also filed to recover some other dues, pertaining to two other contracts.

7) It is not in dispute that the dispute raised in this petition is also the subject matter of nine suits and as pointed out by Mr.Kaji, out of them, seven civil suits are in connection with the amount in question and bifurcation of the amount is given in various suits. In view of the aforesaid fact, it is clear that the question whether the respondent is entitled to get the decree of the aforesaid amount is sub-judice before the Civil Court, wherein after recording evidence, the claim of the respondent-Corporation will have to be adjudicated. If ultimately, the suits are decreed, the question about payment of the aforesaid amount will be decided and naturally the petitioner-company will have to act as per the decree of the Civil Court, which may be subject matter of further appeal, if any. In my view, since substantive suits are filed for recovering the amount, naturally, the question raised in this petition is required to be decided by the Civil Court in the pending suits.

8) In that view of the matter and considering the fact that the Civil Suits are pending before the competent Court, this petition is disposed of by passing the following order :-

During the pendency of the respective Civil Suits, the respondent-Corporation will be entitled to encash the Bank Guarantee in question, which is of Rs.32.94 lacs. However, encashment of the said Bank Guarantee will be subject to the final outcome of the aforesaid Civil Suits. If ultimately, the suits are dismissed, the respondent-Corporation shall refund the said amount to the petitioner-company with interest. If the suits are decreed, the respondent-Corporation can naturally proceed to recover the amount as per the decree of the Civil Court, after adjusting the amount of Rs.32.94 lacs. In short, withdrawal of amount of Bank Guarantee shall be subject to the final outcome of the aforesaid Civil Suits.

Since the dispute in question is in connection with seven contracts, which came to an end, if any other

contract is awarded to the petitioner-company by the respondent-Corporation for supply of cement or if any such contract will be awarded in future, the same should be governed by independent contracts and the impugned order of the Superintending Engineer challenged in this petition is not required to be taken into consideration so far as said contracts are concerned, and whatever payment is required to be made will be governed by the separate contracts, which might have been executed by the parties or which may be executed in future. In short, so far as other contracts are concerned, since they are independent contracts, the present order at Annexure-T should not be enforced for the purpose of retaining or collecting or making any payment or adjusting any payment, on the basis of the aforesaid order of the Superintending Engineer so far as those contracts are concerned.

Since several suits are pending before the Baroda Court on the same issue and since the suits are in connection with the same subject matter, the learned District Judge of Baroda is directed to see that all the aforesaid suits are assigned to one Judge, who can adjudicate all the suits together at the same time. This part of the order is passed with the consent of both the sides. The learned District Judge may accordingly assign all the aforesaid civil suits to one Judge. All the above suits are ordered to be disposed of latest by 31st December, 2004. Both the learned advocates have assured the Court that their clients and their counterparts will cooperate in early disposal of the aforesaid suits, pending in the Court of Civil Judge (S.D.) Baroda. Mr.Raval for the petitioner-company has stated that they will file their written statement latest by 1st March, 2004. Mr.Kaji, learned Senior Counsel, has assured the Court that in case the suits are dismissed, the respondent-Corporation will act in accordance with law in the matter of refunding the amount, which they are permitted to withdraw by encashing the Bank Guarantee. It is clarified that whatever amount, which the respondent-Corporation has already withdrawn towards the disputed amount will be subject to ultimate adjustment as per the decree that may be passed by the Civil Court in the aforesaid suits. It is also clarified that if the respondent-Corporation has not paid any amount towards the outstanding bill of the petitioner-company, pursuant to the order at Annexure-T, the same shall be subject to the final outcome of the suits. It is fairly stated by the learned advocate for the respondent-Corporation that after the conclusion of the suits, if the Corporation is required to pay any legitimate dues of the present

petitioner, the same shall be paid in accordance with law. It is clarified that the Civil Court may decide aforesaid Civil Suits in accordance with law, without being influenced by the order passed by the Superintending Engineer, which is at Annexure-T, as well as by the present order, by which the respondent-Corporation is permitted to encash the Bank Guarantee.

9) This petition is accordingly disposed of as per the above directions given in this order. Rule is discharged. No order as to costs.

10) In view of this order in Special Civil Application, no order on Civil Applications.

11) Writ to be sent to the trial Court forthwith.

(P.B.Majmudar,J.)

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